UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER FOR SOCIAL CHANGE, INC., Respondent, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 500. Charging Party	CASE NO. 5-CA-72211 **ORAL ARGUMENT REQUESTED**

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE AND OPPOSITION TO ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Center For Social Change, Inc. ("CSC" or "the Employer"), Respondent in the above captioned case, by its undersigned attorneys, pursuant to Section 102.24(b) of the National Labor Relations Board's Rules and Regulations, respectfully submits this Response to Notice to Show Cause and Opposition to Acting General Counsel's Motion for Summary Judgment.

FACTS

On September 23, 2011 a Petition was filed in Case 5-RC-065270 by the Service Employees International Union, Local 500 ("the Union") seeking certification as the exclusive bargaining agent for certain employees of the Center for Social Change, Inc. ("the Employer" or "CSC"). Subsequently, a hearing was held on October 7, 20011 at Region 5 of the National

Labor Relations Board ("the Board"). The sole disputed issue at that hearing was whether the election would be conducted manually, as proposed by the Employer, or by mail ballot, as proposed by the Union. On October 13, 2011, the Regional Director for Region 5, prior to receiving the post-hearing briefs of the parties, issued a Decision and Direction of Election ("DDE"). The DDE resolved all undisputed issues in the representation proceeding except for the disputed issue of the mail ballot procedure, and it stated that this issue would be addressed separately in an "elections arrangements letter." On October 18, 2011, the Regional Director issued a "elections arrangements letter" which amended the DDE and ordered that the election be conducted by mail ballot rather than the standard manual election with all its established safeguards.

On October 27, 2011 CSC timely filed a Request for Review of the Regional Director's decision to conduct a mail ballot election. On November 18, 2011 the Board issued an Order treating CSC's Request for Review as a Request for Special Permission to Appeal and summarily denying the same.

A mail ballot election was held from November 4, 2011, through November 21, 2011. Out of 229 eligible voters, only 109 ballots were counted. *See* Tally of Ballots, attached as Exhibit 6 to the Acting General Counsel's Motion for Summary Judgment. As the Tally of Ballots shows, 26 ballots were challenged, most of them on the basis that their containing envelopes were improperly signed, 2 ballots were void and 92 voters did not cast ballots at all. Thus, 120 voters, or approximately 52% of voters, did not participate in the election either because Region 5 did not receive their ballots or their ballots were not counted.

On December 1, 2011, the Regional Director for Region 5 issued a Certification of Representative. Subsequently, CSC received a Complaint and Notice of Hearing issued by the Regional Director for Region 5 dated November 30, 2011[1], alleging that CSC has violated Sections 8(a)(1) and 8(a)(5) of the Act. On February 3, 2012 Counsel for the Acting General Counsel filed a Motion to Transfer Proceedings to the Board and Motion for Summary Judgment ("Motion for Summary Judgment"). On February 7, 2012, the Board issued an Order Transferring Proceeding to the Board and a Notice to Show Cause directing that CSC show cause as to why the Acting General Counsel's motion should not be granted. CSC opposes the Acting General Counsel's Motion for Summary Judgment and maintains that it should not be granted for the reasons set forth below:

ARGUMENT

I. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THERE ARE MATERIAL ISSUES OF FACTS IN DISPUTE REGARDING THE CONDUCT OF THE MAIL BALLOT ELECTION THAT ARE NOT PART OF THE RECORD.

CSC throughly explained in its Request for Review in Case 5-RC-065270 (attached to Acting General Counsel's Motion for Summary Judgment as Exhibit 4) why the mail ballot

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[1]As acknowledged by the Acting General Counsel in Paragraph 12 of his Motion for Summary Judgment, the Employer's service copy of the Complaint bears the date November 30, 2011. This is the only copy of the Complaint that as been properly served upon CSC and it is the Complaint to which CSC responded in its Answer. Since the Acting General Counsel now alleges that CSC was not served with a correct copy of the Complaint, bearing the date January 18, 2012, the Complaint should be dismissed as it was never properly served under the Board's Rules and Regulations §102.113. At very least, there is an issue of material fact regarding the date that the Complaint was issued and this precludes summary judgment and requires a hearing. To the extent that the Complaint predates the unfair labor practice charge, it is impermissibly based on an *anticipated* violation of the Act, not an *actual* violation.

procedure was, at least in this circumstance, not a lawful means of conducting an election under the Act. CSC expressly incorporates by reference the arguments and authorities contained in its Request for Review herein. Since the Union was certified using an election procedure not authorized under the Act or under Board precedent or policy, CSC is under no obligation to bargain with the Union.

As the election results show, the mail ballot procedure clearly suppressed voter turnout and denied eligible voters the opportunity to vote. CSC's challenge to the mail ballot procedure, including its Request for Review, anticipated the issue of low voter participation under the mail ballot procedure - the very reason that Board policy has historically favored the manual procedure. A study by the office of the General Counsel noted that the average rate of participation using a manual election procedure is 81.57% whereas mail or mix manual/mail elections on average only have a participation rate of 65%, *Memorandum GC 08-05: Report on Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section.* 2008 WL 2484199 (N.L.R.B.G.C. 2008). In *Shepard Convention Services, Inc. v. NLRB* 85 F.3d 671 (D.C. Cir. 1996), the D.C. Circuit identified low voter participation as a factor weighing in favor of reversing the Board where the Board had ordered a mail ballot election resulting in only a small percentage eligible voters casting valid ballots. Voter turnout could hardly have been lower in this instance as only 48% of eligible voters had their ballots counted. The inferiority of the mail ballot procedure was illustrated by the low turnout and the fact that 28 ballots received by the Region 5 were not counted due to problems unique to mail ballots (i.e. improper signatures and gnarled envelopes). Thus, 20% of voters who successfully submitted their ballots to Region 5 did not have their votes counted.

A hearing is needed to develop a record of the reasons why 52% of the electorate were disenfranchised in this election. This would include a review of the mail ballots returned for improper addresses, examination of witnesses disenfranchised including the reasons why they were unable to vote or properly complete the complicated mail ballot procedures, a determination of whether adequate notice of the election and the mail ballot procedures was received by voters and an identification of other conditions which lead to such a low rate of participation. Because so many voters were disenfranchised by a mail ballot procedure that has historically been disfavored by Board policy and because the use of such a procedure that was not lawful, at least in this circumstance (for reasons explained in CSC's Request for Review), CSC has never been under any obligation to bargain with the Union and the Decision and Certification of Representative should be vacated.

II. THE PURPORTED NEW MEMBERS OF THE BOARD HAVE NOT BEEN VALIDLY APPOINTED, AND THE AGENCY THEREFORE LACKS A QUORUM TO ACT IN THIS CASE.

The Supreme Court has held that the Board lacks authority to conduct business in the absence of a quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such *ultra vires* agency action are entitled to injunctive relief. *See Ryder v. United States*, 515 U.S. 177 (1995) (Individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F. 3d 821, 828 (D.C. Cir.

1993). Here, all but two of the current putative members of the Board were appointed in violation of the Appointments Clause of the U.S. Constitution because the President attempted to appoint Members Block, Griffin, and Flynn on January 4, 2012 while the U.S. Senate was in session but without seeking or obtaining the Senate's Advice and Consent, in violation of Article II, Section 2, Clause 2 of the Constitution.[2] Any claim that these appointments were somehow valid "recess" appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess when such appointments are made. See *Evans v. Stephens*, 387 F. 3d 1220, 1224 (11th Cir. 1994) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment); see also *Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F. 2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages). Because neither the House nor the Senate declared themselves in recess, the purported recess appointments to the Board are invalid.

Therefore, since the Board lacks a quorum of validly appointed Members, the Board's Order Transferring Proceedings to the Board and Notice to Show Cause was *ultra vires* and improperly issued. Because Members Block, Grifin and Flynn's "recess"appointments to the Board by President Obama were unconstitutional, the Board lacks a quorum under *New Process*

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[2] By unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784). Moreover, the House of Representatives never gave its consent to a Senate recess of more than three days, as would have been required by Art. I, Section 5, Clause 4 of the Constitution.

Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010), and thus the Board should not rule on the Acting General Counsel's Motion for Summary Judgment in this case until the Board has a properly appointed lawful quorum.

III. THE COMPLAINT IN THIS CASE IS ULTRA VIRES BECAUSE THE ACTING GENERAL COUNSEL OF THE BOARD DID NOT LAWFULLY HOLD THE OFFICE OF ACTING GENERAL COUNSEL AT THE TIME HE DIRECTED THE COMPLAINT BE FILED.

The Acting General Counsel has requested the Board to strike CSC's second affirmative defense, which alleges that the complaint is *ultra vires* because the Acting General Counsel did not lawfully hold office at the time he directed the complaint to be filed. (Motion for Summary Judgment ¶ 11). This request should be denied because the appointment of the Acting General Counsel was clearly improper.

The Act provides that, "[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy." 29 U.S.C. § 153(d). The statute places an express limitation on this authority to designate an Acting General Counsel: "[N]o person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate . . . ." *Id.* Here, the President designated Lafe Solomon as the Acting General Counsel effective June 21, 2010. The President did not, however, submit a nomination to the Senate to fill the position of General Counsel within 40 days of that designation. Rather, it was only on January 5, 2011, that the President nominated Mr. Solomon to serve as General Counsel. Accordingly, the Act prohibited Mr. Solomon from serving as Acting General Counsel beyond July 31, 2010—forty days after his appointment—and

he therefore lacked authority to direct the complaint to be filed against CSC, either on November 30, 2011 (when the Complaint is dated) or on January 18, 2012 (when the Acting General Counsel now alleges that the Complaint was issued).

The Federal Vacancies Reform Act of 1998 ("FVRA") does not alter this conclusion. The FVRA provides that, if an office in an executive agency becomes vacant, the President may "direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(3). The FVRA also provides that an officer acting temporarily under § 3345 may serve "(1) for no longer than 210 days beginning on the date the vacancy occurs; or (2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate." Id. § 3346(a).

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); see also *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (same). Unless the general statute has repealed the specific one, the specific statute controls. See *Defenders of Wildlife*, 551 U.S. at 662–63. Under these principles, the Acting General Counsel's authority to direct the filing of the complaint in this case is controlled by the Act, not the FVRA. The provision of the Act at issue specifically addresses vacancies in the office of General Counsel within the NLRB. The FVRA, in contrast, governs vacancies in executive agencies generally. It does not directly address the time period in which an Acting General Counsel may serve—much less repeal the Act's forty-day limitation on that service.

Since the Acting General Counsel was not lawfully appointed at the time that the Complaint was issued, the Complaint is therefore *ultra vires* and the Board should dismiss it on that basis.

CONCLUSION

Based on the arguments and authorities contained herein, CSC respectfully requests that the Board deny the Acting General Counsel's Motion for Summary Judgment because there are material facts in dispute regarding reasons for lack of participation and whether the Complaint was properly issued. Moreover, the Union was certified under an unlawful election procedure. Thus, CSC respectfully requests that Board enter such relief as it deems appropriate, including vacating the Board's Decision and Certification of Representative entered December 1, 2011 in Case 5-RC-065270 and revoking the certification issued in that case, dismissing the Complaint in the above-captioned action, and remanding Case 5-RC-065270 to the Regional Director for appropriate action, including the direction of a new election. *See Sub-Zero Freezer Co., Inc.*, 271 NLRB 47, 47-48 (1984). Alternatively, CSC requests that the Board not issue a ruling in this case until the Board has a properly appointed lawful quorum. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Respectfully Submitted,

Christopher M. Feldenzer

Nicholas C. Sokolow

Serotte, Rockman & Wescott, P.A.
409 Washington Avenue, Suite 610
Baltimore, MD 21204-4903
Phone: (410) 825-7900;
Fax: (410) 825-7913

Attorneys for Respondent Center for Social Change, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2012, I caused a copy of the foregoing RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE AND OPPOSITION TO ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT to be e-filed with the Board served by electronic mail upon:

Wayne R. Gold
Regional Director
National Labor Relations Board
Region 5
103 South Gay Street, 8th Floor
Baltimore, Maryland 21202
wayne.gold@nlrb.gov

Matthew J. Turner
Counsel for the Acting General Counsel
National Labor Relations Board
Region 5
103 South Gay Street, 8th Floor
Baltimore, Maryland 21202
matthew.turner@nlrb.gov

Steve Schwartz
Attorney for SEIU Local 500
901 Russell Avenue
Suite 300
Gaithersburg, MD 20879
schwartzs@seiu500.org

Nicholas C. Sokolow